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POSCO DAEWOO MALAYSIA SDN BHD v. TENAGA WAN BERSAUDARA SDN BHD

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
LEE HENG CHEONG JCA
B MARIANA YAHYA JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-2586-12-2018]
13 JULY 2022

C **Abstract** – *The agent, despite not having the requisite approved permits, was authorised by the respondent to run and manage a reconditioned automobiles warehouse using the respondent's approved permits. In the circumstances where the agent could not deal with the respondent's approved permits without the involvement of the respondent, the respondent could not later backtrack to say that it had* D *no knowledge of the agent nor the agent's dealings. Any act by the agent, while dealing with the respondent's approved permits with third parties, made him the respondent's agent. The respondent was therefore liable for the actions of the said agent.*

E ***CONTRACT:*** *Agreement – Credit facility agreements – Parties entered into agreements for financing of import of reconditioned automobiles – Facility provider entered into agreements with agent or chief executive officer ('CEO') of company – Default in repayment – Allegation that person who entered into agreements had no authority to enter into agreements on behalf of company – Whether person agent/* F *CEO – Whether company allowed agent/CEO to obtain trade credit facility from facility provider – Whether Turquand's Rule could be relied on – Whether agreements valid as facility provider did not have requisite licence to provide moneylending with interests – Companies Act 2016, s. 39 – Contracts Act 1950 – Moneylenders Act 1951*

G The appellant and the respondent executed credit facility agreements and an additional agreement ('agreements') where the former agreed to provide the latter a trade credit facility to finance the import of reconditioned automobiles. According to the appellant, it entered into the agreements with one Chua who was allegedly the respondent's agent or chief executive officer H ('CEO'). The initial six transactions went well but when the respondent was due to pay the seventh and eighth transactions, it requested for an extension of time. The respondent proposed instalment payments over a period of 12 months to settle the outstanding amount. The respondent's director ('DW5'), provided the appellant with 12 post-dated cheques belonging to the I respondent, signed by him personally as collateral for the repayment. The

appellant accepted the repayment proposal but the first post-dated cheque was dishonoured when presented for payment. The respondent then partly paid for the seventh transaction. As there were no further payments forthcoming, the appellant initiated an action against the respondent, at the High Court, for the recovery of the balance sums due under the seventh and eighth transactions. The High Court, however, dismissed the action on the grounds that (i) the appellant failed to prove that Chua had clear authority to enter into the agreements; (ii) the evidence did not prove that Chua acted as the respondent's agent or CEO; (iii) Chua fully managed the warehouse at Jalan Ampang ('warehouse') and the respondent did not have dealings at all at the said warehouse; (iv) the payments made by the respondent to the appellant, using its bank account, did not prove that it was the respondent which made the payments to the appellant; (v) the evidence adduced did not show that the respondent allowed Chua to obtain the trade credit facility from the appellant and the appellant could not rely on *Turquand*'s Rule to hold the respondent liable for Chua's acts; and (vi) the agreements were void as the appellant did not have the requisite licence to provide moneylending with interests. Hence, the present appeal.

Held (allowing appeal with costs)
Per Lee Heng Cheong JCA delivering the judgment of the court:

(1) The importation, sales and the storage of the cars at the warehouse could not have been carried out unless the importation of cars was related to a company with approved permits and, in this case, it was the respondent. Without the respondent's approved permits, there would have been no imported cars being stored at the warehouse to begin with. Chua did not have the requisite approved permits and the respondent had authorised him to run and manage the warehouse using the respondent's approved permits. Chua could not deal with the respondent's approved permits without the involvement of the respondent. Furthermore, when Chua invited the appellant to the warehouse to discuss about the trade credit financing arrangements for the respondent, which the respondent claimed it did not know, Chua gave the appellant his name card with the respondent's name. Chua was representing the respondent. Although Chua's name card could not carry the title of a CEO, he possessed the requisite powers and authority to enter into the agreements on behalf of the respondent. Any act which Chua did, while dealing with the respondent's approved permits with third parties, made Chua the respondent's agent. The respondent was liable for the actions of Chua. (paras 32, 33, 36 & 53)

(2) The respondent could not deny absolute ignorance or knowledge about the operations and status of the bank account. Surely the respondent, being the approved permit holder and the bank account holder, would

A still need to retain residual control and knowledge of the bank account as the respondent would still enjoy profits arising from the sales of the imported cars by Chua and needed to prepare accounts arising from this bank account. Thus, the respondent presumably would have a continued interest in the control and operation and monitoring of the bank account. In addition, as an approved permit and account holder, the respondent would still need to know and retain control about the status and operation of the bank account as it would need to prepare and submit returns to the Income Tax Department and other relevant Government authorities. The respondent ought to know where the trade credit financing was coming from, for the importation of cars, right from the beginning. Therefore, the respondent's contention of pre-signing the cheques and telegraphic transfers application forms without the knowledge of how the bank account was operated, had no merits at all. (paras 43 & 44)

(3) The respondent had authorised and ratified Chua's acts and dealings with the appellant. Even if the respondent initially did not know of the transactions or the trade credit financing agreements with the appellant, the first opportunity of knowledge was when payments for the first transactions were due, in that, payments were made to the appellant by way of the respondent's bank account. Neither the approved permit applications to import the cars nor the forms for custom clearance or airway bills carried the appellant's name as the supplier. If DW5, who was one of the directors of the respondent, did not ratify this transaction and the trade credit financing agreement, he impliedly did so by signing payments to the appellant. The acts of ratification were made at least five times as payments by cheques and telegraphic transfers were signed by DW5 under five transactions. (para 49)

(4) The *Turquand*'s Rule protected not the respondent but persons dealing with the respondent. The appellant, in dealing with the respondent, should not be concerned with the internal requirement of any authority which may lead to any acts done on the respondent's behalf being declared *ultra vires* because of the lack of requisite authority or a defect in appointment or qualification. Even if the appellant were to inspect the documents at the Companies Commission of Malaysia ('CCM'), the appellant would still be unable to discover the internal arrangement between the respondent and Chua. Such internal arrangement would not be revealed or reflected in the various documents filed with the CCM. Section 39 of the Companies Act 2016 ('Act') stipulates that no person must be considered to have notice or knowledge of the contents of the constitution or any other documents available for inspection relating to a company except for documents relating to instrument of charges. The

appellant, as an outsider or third party dealing with the respondent in good faith, ought to be protected under the *Turquand*'s Rule and s. 39 of the Act and the relevant provisions of the Contracts Act 1950. (paras 59, 61, 62 & 70)

(5) The appellant was not a moneylender and, therefore, was definitely not an unlicensed moneylender. The appellant's memorandum and articles of association empowered the appellant to undertake financing as part of its business activities in export and import transactions. The eight transactions were financings made available under the trade credit financing agreements so that the respondent may import cars using its approved permits. The respondent failed to prove that the appellant was a moneylender and that the transactions carried out were in breach of any provisions of the Moneylenders Act 1951 ('MLA'). The agreements were not illegal moneylending transactions nor were they caught by the provisions of the MLA. (paras 86-89)

Case(s) referred to:

Chan Yin Tee v. William Jacks & Co (Malaya) Ltd [1964] 1 LNS 18 FC ***(refd)***
Chow Yoong Hong v. Choong Fah Rubber Manufactory [1960] 1 LNS 17 PC ***(refd)***
Donald McArthy Trading Pte Ltd and Others v. Pankaj Dhirajlal (trading as TopBottom Impex) [2007] SGCA 8 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Gillespie Bros & Co v. Ngui Mui Khin & Anor [1978] 1 LNS 50 HC ***(refd)***
Global Ventures Network Sdn Bhd v. Lokman Dato' Mohd Kamal & Another Appeal [2018] 7 CLJ 1 CA ***(refd)***
Kang Hai Holdings Sdn Bhd & Anor v. Lee Lai Ban [2018] 2 CLJ 550 FC ***(refd)***
KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Litchfield v. Dreyfus [1906] 1 KB 584 ***(refd)***
Lorrain Esme Osman v. Elders Finance Asia Ltd [1992] 1 CLJ 579 ***(refd)***
Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1979] 1 LNS 60 FC ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Other Appeals [2018] 8 CLJ 686 CA ***(refd)***
Wilson v. Tumman [1843] 6 Man & G 236 ***(refd)***

Legislation referred to:

Companies Act 2016, s. 39
Contracts Act 1950, ss. 135, 138, 139, 140, 149, 150, 152, 179, 182
Customs Act 1967, s. 65
Moneylenders Act 1951, s. 2

For the appellant - Dason Raj Elva Raj & Joanne Low; M/s Dason Raj & Partners
For the respondent - Wong Leong Hong & S Sathananta Kumar K Sivanesan; M/s SS Kumar & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22NCVC-837-12-2016 (overruled).]

Reported by Najib Tamby

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JUDGMENT

Lee Heng Cheong JCA:

Background

B **[1]** This is an appeal by Posco Daewoo Malaysia Sdn. Bhd., the abovenamed appellant/plaintiff ("appellant") against part of the decision of the learned High Court judge in the High Court of Malaya at Kuala Lumpur on the 16 November 2018, after full trial, which dismissed the whole of the appellant's claim.

C **[2]** In 2014 and 2015, the respondent/defendant ("respondent") approached the appellant/plaintiff ("appellant") and its subsidiaries for trade credit financing for the import of reconditioned automobiles. As a result of the various meetings in 2014, three credit facility agreements dated on 16 July 2014, 20 August 2014 and 16 October 2014 ("CFAs") respectively were executed between the parties and the said Additional Agreement D No. 1 dated 27 March 2015 ("AA") was also duly signed.

[3] Pursuant to the CFAs and AA, the appellant agreed to provide a trade credit facility to the respondent to finance the import of reconditioned automobiles.

E **[4]** Under the appellant's trade credit financing, between August 2014 and April 2015, the respondent bought and imported 46 cars from its foreign supplier, Wintheory Limited ("Wintheory"), spreading over eight separate transactions.

[5] The appellant paid Wintheory for the prices of the said 46 imported F cars whilst the respondent repaid the trade credit financing facility granted within 150 days thereafter. All went well for the initial six transactions. When the respondent was due to pay for the seventh and eighth transactions, the respondent requested for an extension of time to make the necessary payments.

G **[6]** The respondent then proposed instalment payments over 12 months' period to settle the outstanding amount of GBP1,158,862. DW5, the respondent's director, Mohamed bin Jusoh ("Mr. Jusoh") provided the appellant with 12 post-dated cheques belonging to the respondent, signed by him personally as collateral for the repayment to the appellant. The appellant H accepted the repayment proposal but the first post-dated cheque was dishonoured when presented for payment.

[7] The respondent then through Gestor Finance Limited ("Gestor Finance") paid GBP100,000 as part payment for the seventh transaction. After that, there was no further payments made to the appellant.

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[8] The respondent had breached the payment terms under the CFAs and the AA by failing to pay the outstanding sum of GBP1,158,862 based on two invoices issued for the imported cars less GBP100,000 paid to appellant which formed the subject matter of the seventh and eighth transactions.

[9] The appellant then initiated legal action against the respondent in the High Court to recover the balance sums due under the seventh and eighth transactions for the total sum of GBP1,058,862 with late payment interests from the due date of payment until the full and final settlement.

[10] The appellant's action was dismissed by the High Court. Being aggrieved, the appellant appealed.

[11] We have heard the appeal by the appellant and we unanimously allowed the appeal. We hereby give our reasons.

Findings And Decision Of The High Court

[12] On 16 November 2018, after a full trial, the learned High Court Judge ("the learned High Court Judge"), held *inter alia* as follows:

(i) that the appellant failed to prove Chua Bean Hong ("Chua") had clear authority to enter into the CFAs and AA;

(ii) that the evidence did not prove that Chua acted as the respondent's agent or Chief Executive Officer although Chua had some connection with the respondent in handling the business of importing reconditioned cars using the respondent's approved permits to import reconditioned cars ("approved permits");

(iii) that Chua fully managed the warehouse at Jalan Ampang and the respondent did not have dealing at all at the warehouse;

(iv) that the payments made by the respondent to the appellant, using its Maybank account at Mont Kiara did not prove that it was the respondent which made the payments to appellant as the bank account was merely to give convenience to Chua to deal with the use of the respondent's approved permits;

(v) that the evidence adduced did not show that the respondent allowed Chua to obtain the trade credit facility from the appellant and the appellant could not rely on *Turquand's* Rule to hold the respondent liable for Chua's acts; and

(vi) that even if Chua had clear authority from the respondent or based on the *Turquand's* Rule, the CFAs and AA were void because the appellant did not have the requisite licence to provide moneylending with interests.

A **The Appellant's Contentions**

[13] Before us, the appellant advanced three main issues as follows:

(i) The agency issue

(a) that Chua operated and acted on behalf of the respondent as the respondent's director, Mr. Jusoh, personally signed and authorised payments to the appellant and then, confirmed the purchase of the imported cars under the seventh and eighth transactions;

(b) that it is insufficient for the respondent to merely say it pre-signed cheques and telegraphic transfers for payments over RM69,000,000 under the credit financing agreements or that it knows nothing about such transactions. Such a defence has no merit or credibility; and

(c) the factual matrix of this case showed that the respondent authorised and ratified Chua's acts and dealings with the appellant.

(ii) The *Turquand's* Rule

(a) that the rule in *Turquand*'s case protects not only the respondent but persons dealing with the respondent. In this case, the appellant contended that Chua had implied if not actual authority to act for the respondent because the respondent granted Chua, access and authority to deal with third parties in respect of the respondent's approved permits to import cars; and

(b) that Chua was at all material times the respondent's agent and thus, the respondent was liable for Chua's acts. The *Turquand's* Rule ought to also protect the appellant when dealing with the respondent. In any event, the appellant contended that the respondent had ratified Chua's acts.

(iii) The moneylending issue

(a) that the various transactions were not caught by the Moneylenders Act 1951("MLA 1951");

(b) that the respondent had failed to prove that the appellant was a moneylender carrying out moneylending business in breach of the MLA 1951;

(c) that if the financing agreements were void, the appellant ought to be granted relief by way of restitution, being the less culpable party. If restitution did not come into play, unjust enrichment would result.

The Respondent's Contentions

[14] Before us, the respondent contended *inter alia* as follows:

(i) that the CFAs and AA were null and void as PW3, Chua had no authority to execute such agreements, the respondent had never applied for the trade credit facility from the appellant nor was respondent or its directors aware of the above until the month of February 2016;

(ii) that Chua was not the Chief Executive Officer and did not hold any position in the respondent and that Chua was an independent car salesman; and

(iii) that the CFAs and AA and the transactions pursuant thereto were not valid or unenforceable as they contravened the Financial Services Act 2013 and/or the Moneylenders Act 1951.

Our Analysis And Findings

[15] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.** (emphasis added)

[16] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[17] Bearing in mind the above principles distilled from the above cases, we will now deal with the appellant's appeal.

The Agency Issue

[18] From the evidence adduced, it is undisputed that all of the eight transactions between the appellant and respondent were handled by Chua who was based at the respondent's Ampang showroom *cum* warehouse at Jalan Jelatek, Ampang and later, at a bonded warehouse at Jalan Ampang ("the Ampang warehouse"), which was used to store and sell the cars imported under the respondent's approved permits. Chua was the person managing the Ampang warehouse and he was also the person who signed the CFAs and AA on behalf of the respondent with the appellant and also used the respondent's approved permits to import cars to Malaysia from United Kingdom under the CFAs and AA.

[19] Wintheory has been supplying cars to the respondent since 2013 and is based in the United Kingdom and Hong Kong.

[20] Between August 2014 and April 2015, the respondent bought and imported 46 cars spreading over eight separate transactions from Wintheory, using the trade credit financing provided by the appellant. The *modus operandi* for all eight transactions herein were similar and are as follows:

(i) the respondent first identified the cars that it wished to import and buy from Wintheory, who in turn issued a proforma invoice to the appellant for the prices of the imported cars. Upon receipt of the imported cars, the appellant issued a proforma invoice to the respondent including an agreed 4.3% administrative fee, for utilising the trade credit financing facility;

(ii) the respondent then arranged and coordinated the transfer of ownership, shipment, importation, custom clearance for all cars in United Kingdom and Malaysia under the proforma invoices.

(iii) once the imported cars arrived in Malaysia and cleared custom inspections in Malaysia, the respondent then issued a letter of confirmation to the appellant together with (i) a copy of the relevant airway bills for each imported car; and (ii) custom clearance forms ("K8 forms") for each imported car (collectively, the "confirmation documents"). On receipt of these confirmation documents, the appellant through its owners and intercompany arrangements pays Wintheory for the imported cars, utilising the trade credit financing facility granted under the CFAs and AA; and

(iv) the appellant then concurrently issued a commercial invoice to the respondent which was due for settlement within 150 days. The respondent paid the appellant for all the earlier six transactions and as stated earlier, the seventh and eighth transactions were the ones in dispute.

[21] The respondent was due to pay for the seventh and eighth transactions on 12 August 2015 and 19 September 2015 respectively. However, on 1 September 2015, the respondent sought an extension of time until 12 November 2015 and 20 November 2015 respectively to settle the payments and this was agreed to, by the appellant.

[22] On 12 November 2015, the respondent proposed an instalment repayment over 12 months, commencing on 29 January 2016 until 31 December 2016 with interest at the rate of 10% a year and provided post-dated cheques of the respondent, signed by Mr. Jusoh as collateral for the proposal. This proposal was accepted by the appellant but the first post-dated cheque was dishonoured when presented.

[23] The appellant and the respondent then met on 12 February 2016, 16 February 2016, 18 February 2016, 22 February 2016 and 24 March 2016 respectively. The respondent who was then represented by solicitors, requested for more time to repay the appellant.

[24] On 22 February 2016, the respondent with the benefit of legal advice, issued a letter of confirmation stating it bought the six cars under the seventh and eighth transactions for GBP1,158,862. Three days later, the respondent's solicitors wrote, informing that the confirmation was for the appellant, to submit a claim to its credit insurers. However, the insurers rejected the appellant's claim based on the High Court's decision in respect of this case.

[25] On 29 February 2016, the respondent made a part payment of GBP 100,000 to the appellant through Gestor Finance Limited ("Gestor") for the seventh transaction. Between 1 March 2016 and 6 June 2016, the appellant and the respondent continued to negotiate for an amicable settlement but eventually, the appellant rejected all the respondent's proposals.

[26] On 8 June 2016, after the appellant's subsidiaries-initiated arbitration proceedings against the respondent in Korea for non-payment of a separate credit facility, the respondent lodged a police report against Chua and the appellant alleging for the first time, that Chua conspired with the appellant to commit fraud against the respondent.

[27] The undisputed fact is Chua and the respondent started their relationship in 2011 when Chua was engaged by the respondent to apply for additional approved permits to import cars from the Ministry of International Trade and Industry ("MITI"). Chua managed to do so and MITI increased the allocation for the respondent from less than 300 to 500 approved permits per year. As a result, the respondent agreed to reward Chua with at least 30 approved permits, a year. Mr. Jusoh also testified that Chua has done over 100 deals with the respondent over the years.

[28] Arising from the increase in the approved permits, the respondent then rented the Ampang warehouse, to set up a bonded warehouse to store and sell the imported cars under the respondent's approved permits. Pursuant to s. 65 of the Customs Act 1967, the Ampang warehouse was under the respondent's licence as the respondent was an approved permit holder and carried only the respondent's signage.

[29] The respondent contended that Chua only managed and was given extensive powers and control over the operations of the Ampang warehouse, to buy and sell cars imported using the respondent's approved permits. It is noted that the respondent never professed it had no dealings in the Ampang warehouse and Mr. Jusoh further said that the respondent had employees in the Ampang warehouse. The respondent also stated that Chua rented, paid the operating and building costs, and carried his own business under Giat

Perintis Sdn Bhd ("Giat Perintis") at the Ampang warehouse. It is also noted that there is no evidence that this is so. The respondent was the party which leased the Ampang warehouse at all times. (see CCBD vol. 2 pp. 547 to 548 (R/P vol. 2(2A) pp. 3362 to 3363)).

[30] We noted that the respondent agreed that it must personally apply to utilise an approved permit to import and sell the car locally under its name. The imported cars stored at the Ampang warehouse were under the respondent's name, care and control and the respondent had representatives stationed at the Ampang warehouse. When the respondent eventually sells the imported cars under its name or conducts the transactions for the imported cars under its approved permits, the sale or transaction shall be between the respondent and the purchaser as the respondent is the approved permit holder.

[31] The respondent's director, Mr. Jusoh stated that there were internal arrangements for Chua to use the respondent's approved permits but gave no notice of that arrangement to the appellant. Further, Mr. Jusoh also stated that Chua was selling the respondent's cars and also other approved permits holder's cars and cars that Chua sourced locally under his own company, Giat Perintis at the Ampang warehouse. Thus, the respondent had acquiesced to Chua's acts.

[32] In the light of the above, we are of the considered view that the learned High Court judge erred in law and in fact when he held that the respondent did not have any dealings in the Ampang warehouse and that Chua fully managed the Ampang warehouse. It is important to note that the importation, sales and the storage of the cars at the Ampang warehouse could not have been carried out unless the importation of cars was related to a company with approved permits and in this case, it was the respondent. Without the respondent's approved permits, there would have been no imported cars being stored at the Ampang warehouse to begin with. Chua did not have the requisite approved permits and the respondent had authorised him to run and manage the Ampang warehouse using the respondent's approved permits.

[33] Chua could not deal with the respondent's approved permits without the involvement of the respondent. Any act that Chua did while dealing with the respondent's approved permits with third parties makes Chua, the respondent's agent. The evidence showed that the respondent used its approved permits to import cars under the trade credit financing facility agreements, stored and sold the imported cars at the Ampang warehouse.

[34] Without the direct involvement, consent and knowledge of the respondent, Chua could not also deal with the respondent's and other approved permits holders' cars as the respondent needed to raise an internal

movement form, to keep the Customs Department or MITI informed of the movements and whereabouts of an imported car from one approved permits holder's bonded warehouse to another.

[35] Even though, the learned High Court Judge, did find that Chua dealt with the respondent's approved permits at the Ampang warehouse, we find that Chua could not have run the Ampang warehouse independently, regardless of what the respondent contended. By Chua's act of handling, selling and managing the cars imported using the respondent's approved permits and dealing with third parties, we are of the considered view that Chua was the respondent's duly authorised agent at the Ampang warehouse.

[36] When Chua invited the appellant to the Ampang warehouse to discuss about the trade credit financing arrangements for the respondent which the respondent claims it did not know, Chua gave the appellant, his name card with the respondent's name during the meeting. Chua operated from the Ampang warehouse, distributed the respondent's name card, occupied the main office in the Ampang warehouse and was representing the respondent to import, store and sell the respondent's cars there. Although Chua's name card could not carry the title of a Chief Executive Officer, we are of the considered view that Chua possessed the requisite powers and authority to enter into the CFAs and AA on behalf of the respondent.

[37] Chua, in support of the application to secure the trade credit financing from the appellant, furnished the appellant with the respondent's audited and financial reports for the year 2010 until 2013 which was provided by Mr. Jusoh. Chua also affixed his title as the respondent's Chief Executive Officer and used the respondent's company stamp to stamp and execute the CFAs, AA and the confirmation documents. To date, there are no police reports lodged that Chua fraudulently or dishonestly procured these documents and company stamp and use them for improper purposes.

[38] Support can be found in *Chan Yin Tee v. William Jacks & Co (Malaya) Ltd* [1964] 1 LNS 18; [1964] MLJ 290, where Thompson LP held that any person irrespective of his competency to contract may become an agent and that does not affect his principal's liability to third parties.

[39] Further, in *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233 at p. 233, Gopal Sri Ram JCA (as he then was) in dealing with ss. 138, 139 and 140 of the Contracts Act 1950 ("CA 1950"), held that there is no requirement that an appointment of an agent must be in writing or evidenced in writing. That appointment may be express or implied, it may be gathered from the facts and circumstances of a case, and from the conduct of the parties.

[40] Section 135 of the CA 1950 defined an 'agent' as a person employed to do any act for another or to represent another in dealings with third person. The person for whom such act is done or who is so represented is called the 'principal'. Further, ss. 135, 138, 139, 140, 149, 150, 152, 179, and 182 of the CA 1950 makes Chua, the respondent's agent and imputes the agent's knowledge to the principal with third parties.

[41] In our considered view, the learned High Court Judge erred when holding that the respondent did not have any dealings in the Ampang warehouse. Given the above facts and based on the law, we find that Chua could not have also dealt with other approved permit holder's cars without the involvement and knowledge of the respondent as the respondent needed to raise an internal movement form to keep Customs Department and/or MITI, informed of the movement of an imported car from one approved permit holder's bonded warehouse to another.

[42] The respondent contended that to facilitate Chua's operations of the Ampang warehouse, the respondent opened a bank account with Malayan Banking Berhad at Mont Kiara. This account was purportedly used to deposit the sales proceeds of the imported cars sold with the respondent's approved permits. Mr. Jusoh testified that he was a signatory to the bank account but explained that he pre-signed cheques and telegraphic transfers application forms. The respondent further stated that it did not know about the trade credit financing agreements, the transactions conducted or payments made by Chua with the appellant until 2016 when the appellant demanded for payment of the outstanding sums.

[43] We are unable to accept such a contention as the respondent cannot deny absolute ignorance or knowledge about the operations and status of the Mont Kiara bank account. Surely the respondent, being the approved permit holder and the bank account holder would still need to retain residual control and knowledge of the bank account as the respondent would still enjoy profits arising from the sales of the imported cars by Chua and needed to prepare accounts arising from this bank account. Thus, the respondent presumably would have a continued interest in the control, operation and monitoring of the bank account. In addition, as an approved permits and account holder, the respondent would still need to know and retain control about the status and operation of the bank account as it will need to prepare and submit accounts or returns to the Income Tax Department and other relevant Government authorities such as MITI and the Customs Department.

[44] The respondent ought to know where the trade credit financing was coming from, for the importation of cars right from the beginning. Upon the execution of the trade credit financing agreements, there were in total eight transactions involving 46 cars conducted with the same *modus operandi*. Upon

the arrival of the cars in Malaysia, the respondent needed to issue to the appellant, the letter of confirmation, under its letterhead, that the imported cars have arrived and cleared customs inspections in Malaysia with the relevant airway bills and K8 forms for each car. Based on this, the appellant paid Wintheory for the imported cars. This is the chronology of the various transactions:

(i) the first transaction involved 11 cars and Mr. Jusoh signed three Maybank cheques for the sum of RM1,772,394.99 to pay the appellant;

(ii) the second transaction involved seven cars and Mr. Jusoh signed two telegraphic transfers to pay the appellant, the sum of GBP600,000;

(iii) the third transaction involved six cars and Mr. Jusoh signed one telegraphic transfer to pay the appellant, the sum of GBP110,000;

(iv) the fifth transaction involved six cars and Mr. Jusoh signed one telegraphic transfer to pay the appellant, the sum of GBP172,600. There is also evidence where Mr. Jusoh requested Chua to change the account from which the funds are used before making payment to the appellant. The pre-signing argument thus has no credibility; and

(v) Mr Jusoh had therefore signed one cheque in the sum of RM1,772,394.99 and signed and authorised a further sum of GBP882,600 by telegraphic transfers.

Thus, we are of the considered view that respondent's contention of pre-signing the cheques and telegraphic transfers application forms without the knowledge of how the Mont Kiara bank account was operated, has no merits at all.

[45] In the light of the smooth completion of the initial six transactions, there was no reason for the appellant to suspect that the respondent did not know anything about the transactions or that no authority was given to Chua to conduct the transactions under the trade credit financing agreements. Beginning with the first transaction, there is evidence to support that the respondent's approved permits were being used for the importation of cars, that the imported cars had cleared custom inspections with K8 forms identifying the respondent as the importer and that payments being made by the respondent for the transactions.

[46] Later, when proposing a payment schedule for the overdue sums for the seventh and eighth transactions on 12 November 2015, the respondent provided 12 post-dated cheques to the respondent, signed by Mr. Jusoh as collateral for the payment schedule totalling RM29,504,181.14.

[47] Thus, we are of the considered view that the learned High Court Judge had erroneously reasoned that the appellant failed to or did not prove that Chua had clear authority or that the respondent appointed Chua as its Chief Executive Officer to enter into the trade credit financing agreements on the respondent's behalf or to act as the respondent's agent.

[48] In any event, we are in agreement with the appellants' contention that when the respondent was presented with the perfect opportunity either to ratify or disown Chua's acts, the respondent elected to expressly ratify Chua's acts, by confirming in writing the purchase of the six cars under the seventh and eighth transaction. Thus, such acts of ratification bind the respondent.

[49] In the appeal before us, we find *inter alia*, as follows. From the evidence adduced, we are of the considered view that the respondent had authorised and ratified Chua's acts and dealings with the appellant. Even if, the respondent initially did not know of the transactions or the trade credit financing agreements with the appellant, the first opportunity of knowledge is when payments for the first transactions were due, in that, payments are made to the appellant by way of the respondent's Mont Kiara bank account. Neither the approved permits applications to import the cars nor the K8 forms for custom clearance, or airway bills carried the appellant's name as the supplier. If Mr. Jusoh who is one of the directors of the respondent did not ratify this transaction and the trade credit financing agreement, he impliedly did so by signing payments to the appellant. The acts of ratification were made at least five times as payments by way of cheques and telegraphic transfers, signed by Mr. Jusoh under the five transactions.

[50] At trial, the evidence showed that Mr. Jusoh agreed and accepted that he had signed or authorised all the cheques and telegraphic transfers from the respondent's Mont Kiara bank account to the appellant and its subsidiaries which were estimated at over RM40,000,000. These were payments for the previous transactions between the appellant and the respondent. He also agreed that he signed or authorised proposed repayments with post-dated cheques for another RM29,504,181.14 to, among others, the appellant. All in all, Mr. Jusoh or the respondent signed and approved RM69,000,000 worth of telegraphic transfers and cheques for payment related to the transactions conducted under the trade credit financing agreements provided by the appellant and its subsidiaries.

[51] During the various transactions, repayment proposals, and the meetings to discuss an amicable settlement, it is noted that the respondent never once disputed Chua's authority to act for and on behalf of the respondent. Even with the benefit of legal advice, the respondent did not once write to renounce or to dispute Chua's authority. By signing the cheques and telegraphic transfers, we are of the considered opinion that the

respondent instead gave Chua, *prima facie* authority to conduct and pay the appellant for each of the transactions, and to negotiate a settlement. In any event, when presented with the opportunity to ratify or disown Chua's acts, the respondent elected to expressly ratify Chua's acts, by confirming in writing the purchase of the six cars under the seventh and eighth transactions.

[52] The respondent also admitted receipt of the statement of accounts from Posco Germany in or around 19 March 2015 showing a trade credit financing transaction of over GBP1,073,801, yet the respondent did not notify the appellant or Posco Germany that these were not authorised trade credit financing transactions as claimed.

[53] In the light of the above, we are of the considered view that Chua is an agent of the respondent and is thus liable for the actions of Chua.

The Turquand's Rule

[54] The learned High Court judge relied on *Kang Hai Holdings Sdn Bhd & Anor v. Lee Lai Ban* [2018] 2 CLJ 550; [2018] 2 MLJ 574 to say that the appellant cannot rely on the *Turquand's* Rule to hold the respondent liable for Chua's acts since Chua's designation did not appear in the business name card. The learned High Court judge also held that the appellant ought to have made sure that Chua held a position in the respondent and had authority to act or should have obtained a director's resolution or made searches with the Companies Commission of Malaysia.

[55] The Federal Court case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 at p. 505 explained the effect of *Turquand's* Rule, holding that the rule reduces the enquiries which outsiders having dealt with a company must make, which promotes business convenience. Such outsiders, like the appellant has no right to insist on proof by the company's directors through a resolution and so, the appellant cannot be considered to have constructive notice of some failure to comply.

[56] The Court of Appeal in *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Other Appeals* [2018] 8 CLJ 686; [2018] 4 MLJ 567 at p. 588, Tengku Maimun Tuan Mat JCA (as she then was) after considering the case of *Pekan Nenas (supra)* and *Kang Hai Holdings (supra)* concluded that the Federal Court's decision in *Kang Hai Holdings (supra)* did not affect the decision in *Pekan Nenas (supra)* which grant protection to outsiders when dealing with companies in good faith. The facts in *Kang Hai Holdings (supra)* can be distinguished. The directors of *Kang Hai Holdings*, in fact, gave notice that the manager did not have actual or ostensible authority to act on its behalf. The invocation of *Turquand*'s Rule in that case could not succeed.

[57] The burden here is on the respondent to show that they gave notice that Chua did not have any authority from the respondent but the respondent failed or omitted to do so despite knowing that the appellant was providing credit financing for the importation of cars using the respondent's approved permits since the first transaction.

[58] The respondent also admitted receipt of the statement of accounts from Posco Germany in or around 19 March 2015 showing a trade credit financing transaction of over GBP1,073,801, yet the respondent did not act to give any notice to the appellant or Posco Germany that this is not an authorised financing transaction.

[59] The rule in *Turquand's* case protects not the respondent but persons dealing with the respondent. In this case, we are of the considered view that Chua had implied if not actual authority to act for the respondent because the respondent granted Chua, access and control to deal with third parties over its approved permits at the Ampang warehouse.

[60] Otherwise, Chua also had apparent or ostensible authority from the respondent because Chua warranted that he had authority from the respondent to deal with the approved permits and imported the cars into Malaysia, which the respondent said he did. Thus, we are of the considered opinion that the appellant has a right to rely on the appearance of authority and hold the respondent, liable.

[61] In general, the appellant, in dealing with the respondent should not be concerned with the internal requirement of any authority which may lead to any act done on the respondent's behalf being declared *ultra vires* because of the lack of requisite authority or a defect in appointment or qualification.

[62] Even if the appellant were to inspect the documents at the Companies Commission of Malaysia, the appellant will still be unable to discover the internal arrangement between the respondent and Chua as such internal arrangement will not be revealed or reflected in the various documents filed with the Companies Commission of Malaysia. Section 39 of the Companies Act 2016 stipulates that no person must be considered to have notice or knowledge of the contents of the constitution or any other document available for inspection relating to a company except for documents relating to instrument of charges.

[63] In the present case, when the respondent appointed Chua in whatever capacity to manage the Ampang warehouse, it had vested in him, not only implied authority but also ostensible authority to do all such things as may fall within the usual scope of dealing with the approved permits. Thus, we are of the considered view that the appellant may safely assume that Chua had the usual authority to enter into the trade credit financing agreements to

utilise the credit facilities, purchase the imported cars, accept delivery of the cars, confirm the clearance of the cars at the Malaysian Customs, to sell the imported cars and to negotiate for repayments of the trade credit facility, and so forth.

[64] In fact, the facts here bear some similarity to the case of *Global Ventures Network Sdn Bhd v. Lokman Dato' Mohd. Kamal & Another Appeal* [2018] 7 CLJ 1; [2018] 6 MLJ 103 at pp. 119 to 120 when the Court of Appeal held that the trial judge failed to have regard to the fact that the import and sales of the luxury cars could not have come to pass unless there was an entity with the approved permits. Without the approved permits, there would be no importation of luxury cars to begin with. The Court of Appeal further held that the plaintiff was not wrong to assume that the sixth defendant was an authorised representative because the sixth defendant had an office space in the first defendant's showroom. The Court of Appeal also disagreed with the trial judge's view that the plaintiff ought to have made separate or independent inquiries as to the status and capacity of the sixth defendant. The sixth defendant was held to have ostensible authority to act for the first defendant.

[65] Sections 149, 150 and 152 of the CA 1950 provide that where acts done by one person on behalf of another but without the other's knowledge or authority, the other may elect to ratify or disown the acts. If he ratifies them, expressly or impliedly, the same effects will follow as if performed by his authority and that ratifies the whole of the transaction of which the act formed a part. That act of ratification binds the principal.

[66] The ratification of the principal does not merely give validity to the agent's unauthorised act as from the date of the ratification, but it is backdated to take effect from the time the agent has acted. Tindal CJ described ratification in *Wilson v. Tumman* [1843] 6 Man & G 236 at p. 242, as follows:

> *That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established principle of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage,* and whether it be founded on a tort or a contract, to the same effect as by, and with all the consequences which follow from the same act done by his previous authority. (emphasis added)

[67] Even if, the respondent did not know of the transactions or the trade credit financing agreements with the appellant initially, the first opportunity of knowledge available to the respondent is when payments for the first transaction were due and payments are made to the appellant. If Mr. Jusoh did not ratify this transaction and credit financing agreements, he impliedly

did so by signing payments to the appellant. The acts of ratification were made at least five times by way of payments signed by Mr. Jusoh under five transactions, in favour of the appellant.

[68] The next distinct act of ratification was when the respondent proposed a repayment of 12 months to the appellant, Mr. Jusoh signed 12 post-dated cheques of the respondent worth over RM29,000,000 and with interest at a rate of 10% a year to pay, among others, the appellant. The effect of those respondent's post-dated cheques expressly or impliedly ratified the transactions and the trade credit financing agreements as well.

[69] Finally, the respondent upon allegedly learning of all the transactions under the trade credit financing agreements, upon taking legal advice on the respondent's legal position despite having the perfect opportunity to renounce the transactions or make a police report, the respondent or Mr. Jusoh elected to explicitly confirm the purchase of the imported cars under the overdue transactions.

[70] We are of the considered view that the appellant, as an outsider or third party dealing with the respondent in good faith, ought to be protected under the *Turquand's* Rule and s. 39 of the Companies Act 2016 and the relevant provisions of the Contracts Act 1950.

[71] In his defence, Mr. Jusoh says he pre-signed all the cheques and telegraphic transfer forms and knew nothing about the transactions or financing agreements until sometime in 2016.

[72] We are of the considered opinion that by allowing payments to be made and received at the respondent's Mont Kiara bank account for the transactions conducted by Chua, using the respondent's approved permits at the Ampang warehouse, this can only mean Chua was the respondent's agent to the world at large.

[73] Further, the learned High Court judge erred in law and in fact in his judgment when holding that most of the payment made by the respondent using the Maybank Mont Kiara account did not prove that the respondent made the payments because the respondent said that the opening of the bank account, was to give convenience to Chua to deal with the respondent's approved permits. We are of the considered view that it is simply not enough for the respondent, an approved permits holder when his approved permits are being used by third party such as Chua, to say that it is ignorant of the various transactions in its company bank account and deny responsibility for the various transactions flowing from its bank account.

[74] Thus, we are of the considered view that the respondent ought to be estopped from asserting the absence of an agency relationship between Chua and the respondent. In the circumstances of this case, if it was true that there

had been no express or implied appointment or engagement of Chua, it would reasonable to assume that the respondent would have returned the statement of accounts sent by Posco Germany to the respondent's registered address, and immediately denied any liability, or refused to pay the appellant for the transactions, or refused to issue post-dated cheques for the repayment, and/or refuse to issue a confirmation for the purchase of the cars in the seventh and eighth transactions.

[75] In the present case, we find that the respondent and Mr. Jusoh did not do what a reasonable person would do. Instead, they did exactly the opposite, which is pay the appellant, admit the purchases, or stay silent and refuse to give any kind of notice to the appellant. The respondent's denial and defence only first came out in June 2016 when it made a police report, after all negotiations ended and arbitrations began. To our mind, it is a calculated afterthought, with the benefit of legal advice, to evade its liability.

[76] We also find that the appellant is entitled to rely on the rule in *Turquand's* case. In this case, Chua had implied if not actual authority to act for the respondent as the respondent granted Chua, access and influence to deal with third parties over its approved permits. Thus, the appellant is entitled to rely on the appearance of authority and hold the respondent liable.

[77] Thus, the appellant, as an outsider or third party dealing with the respondent in good faith, ought to be protected under *Turquand's* Rule and s. 39 of the Companies Act 2016 and the provisions of the Contracts Act 1950.

The Moneylending Issue

[78] The respondent contended in its amended statement of defence and counterclaim that the credit financing under the CFAs and AA agreements were structured or disguised to evade the provisions of the MLA 1951.

[79] The learned High Court judge agreed with the respondent's contention and held that the appellant is not licensed to lend monies and that the appellant is carrying out the activity of moneylending in breach of the MLA 1951. The learned High Court judge also held that when the appellant entered into the CFAs and AA, the appellant was carrying out the activity of moneylending thus requires a licence to do so under the MLA 1951.

[80] In *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] 1 MLJ 74, Lord Devlin, in delivering the judgment of the Privy Council held that, to lend money is not the same thing as to carry on the business of moneylending. Lord Devlin held further as follows:

> *The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed.* If in the form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently

by borrowing and lending money. *But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the court will call it by its real name and act accordingly.* (emphasis added)

[81] The Singapore Court of Appeal in *Lorrain Esme Osman v. Elders Finance Asia Ltd* [1992] 1 CLJ 579; [1992] 1 SLR 369 accepted what Farwell J's observed about the English Moneylenders Act 1900 in *Litchfield v. Dreyfus* [1906] 1 KB 584, where Farwell J said at 590 as follows:

> *The Act was intended to apply only to persons who are really carrying on the business of moneylending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship.* This particular Act was supposed to be required to save the foolish from the extortion of a certain class of community who are called money-lenders as an offensive term. (emphasis added)

[82] Further guidance can be found in the Singapore case of *Donald McArthy Trading Pte Ltd and Others v. Pankaj Dhirajlal (trading as TopBottom Impex)* [2007] SGCA 8, at para. 16, which quoted Syed Othman FJ in *Gillespie Bros & Co v. Ngui Mui Khin & Anor* [1978] 1 LNS 50; [1980] 1 MLJ 87 to hold the Moneylenders Act 1951 related only to pure moneylending transactions and not to transactions which were essentially concerned with the granting of credit facilities even though interest may have been imposed for delayed payment or under an agreement. Syed Othman FJ in *Gillespie Bros & Co Ltd (supra)* said:

> It is a well known fact that even in this country [Malaysia] business houses grant credit facilities subject to payment of interest on the price of goods purchased and the period during which payment for the goods purchased is to be made. *As far as I can see the Moneylenders Ordinance relates only to pure money transactions. It is not intended to apply to interest charged for delayed payment of goods or to interest charged under an agreement by a business house which has made payment for the purchaser on goods taken by the purchaser from the vendor.* The transactions between the parties in the present case are akin to this … I therefore find that there is no merit to the contention that the transactions were a guise for moneylending. (emphasis added)

[83] In the Federal Court case of *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60; [1980] 2 MLJ 9, it was held that not every moneylending transaction is illegal and unenforceable. Salleh Abas FJ speaking for the Federal Court said:

> At the outset we wish to observe that *the Moneylenders Ordinance 1950 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject matter of the Ordinance and must comply with the provisions* … He is a moneylender if within s. 2 of the Ordinance he can be said to be a person 'whose business is that of moneylending'

...

confirming houses are a recognised institution in the promotion and participation of export trade and their business being distinct, the transactions entered into by them with the parties in the export trade could not be held to be moneylending transactions.
(emphasis added)

[84] A consideration of the principles distilled from the above case authorities showed *inter alia* that the MLA 1951 regulates and controls the business of moneylending and protects borrowers of monies lent. Moneylending under s. 2 of MLA 1951 is the lending of money at interest, with or without security, by a moneylender to a borrower. Moneylender means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business. The MLA 1951 prohibits the business of moneylending and not the act of moneylending.

[85] Under the CFAs and AA agreements, the appellant pays Wintheory for the sale of the cars upon arrival and clearance in Malaysia and the respondent repays that facility within 150 days. Under the CFAs and AA, the appellant facilitated and financed the respondent's purchases of imported cars, by making arrangements with the foreign sellers, to pay directly to them for the purchase of the imported cars. For this arrangement, the appellant charged a fee of 4.3% of the actual car price and this mark-up was neither exorbitant nor unusual. It was negotiated and agreed upon in return for credit terms of 150 days from the arrival of the imported cars. This arrangement allowed the respondent, a period of five months to sell the imported cars and pay the appellant.

[86] It is noted that the appellant provided trade credit financing to purchase the imported cars and the trade credit financing agreements were not sham documents. Thus, we are of the considered view that the appellant is not a moneylender and so, definitely not an unlicensed moneylender.

[87] The appellant's memorandum and articles of association empowers the appellant to undertake financing as part of its business activities in export and import transactions. The said eight transactions were financings made available under the trade credit financing agreements so that the respondent may import cars using its approved permits.

[88] In any event, for the respondent to succeed in its "moneylending defence", the respondent bears the burden to prove that the appellant is a moneylender who carried on, advertised, announced itself or held itself out as carrying out the business of moneylending and there is a system and continuity in the appellant's alleged moneylending transactions. Having considered the evidence adduced, we are of the considered opinion that the respondent has failed to prove that the appellant is a moneylender and that the transactions carried out are in breach of any provisions of the MLA 1951.

[89] In the premises, we are of the considered opinion that the CFAs and AA are not illegal moneylending transactions nor are they caught by the provisions of the MLA 1951.

Conclusion

[90] In the light of our above findings, we are of the considered opinion that the learned High Court judge made errors in material findings of facts which warranted appellate intervention. We are of the respectful view that there are merits in this appeal and we unanimously allow the appeal with costs to the appellant. In the premises, we order judgment be entered for the appellant against the respondent as prayed for in para. 25, para. G Prayers (A) and (B) and costs. The order of the learned High Court judge dated 16 November 2018 dismissing the appellant's claim is set aside.

We further award costs of RM60,000 subject to allocator to appellant here and below.